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No. 591

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

NEW ENGLAND MOTOR RATE BUREAU, INC., ET AL., and ACME FAST FREIGHT, INC., ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

**On Appeal From the United States District Court for the District of Massachusetts**

## JURISDICTIONAL STATEMENT

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v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

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**On Appeal From the United States District Court for the District of Massachusetts**

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## JURISDICTIONAL STATEMENT

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Appellants, New England Motor Rate Bureau, Inc.; American Trucking Associations, Inc.; Regular Common Carrier Conference; National Motor Freight Traffic Association, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau, Inc.; Eastern Central Motor Carriers Association, Inc.; Ohio Motor Freight Tariff Committee, Inc.; Middle Atlantic Conference; Middlewest

Motor Freight Bureau; Pacific Inland Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; Southern Motor Carriers Rate Conference; Southwestern Motor Freight Bureau, Inc.; Acme Fast Freight, Inc.; International Forwarding Co.; Lone Star Package Car Company; Merchants Shippers; National Carloading Corporation; Pacific and Atlantic Shippers, Inc.; Republic Carloading & Distributing Co., Inc.; Springmeier Shipping Company, Inc.; Star System, Inc.; Texas Freight Company, Inc.; Universal Carloading & Distributing Co., Inc.; Western Carloading Co., Inc.; Westland Forwarding Co.; and Yellow Forwarding Co., appeal from the judgment of the United States District Court for the District of Massachusetts entered on May 31, 1966, dismissing their complaints to set aside a report and order of the Interstate Commerce Commission and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINION BELOW

The opinion of the District Court is reported at 254 F. Supp. 633 (adv. sheets) and copies of the opinion and judgment are attached hereto as Appendix A. A copy of the Interstate Commerce Commission's report and order in Docket No. 33977, *Freight, All Kinds, L.C.L., Container Charges—U.S.A.*, 323 I.C.C. 468 (1964) is attached hereto as Appendix B.

## JURISDICTION

This suit was brought under 28 U.S.C. § 1336 to enjoin and set aside the report and order of the Interstate Commerce Commission. (Appendix B) The judgment of the District Court was entered on May 31.

1966, and notice of appeal was filed in that Court on July 27, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Drum*, 368 U.S. 370 (1962); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

## STATUTES INVOLVED

The relevant provisions of the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001, and sections 5(1), 5(2)(b), 206, 207, and 208(a) of the Interstate Commerce Act, 49 U.S.C. §§ 5(1), 5(2)(b), 306, 307, and 308(a), are set forth verbatim in Appendix C.

## QUESTIONS PRESENTED

1. Is the Interstate Commerce Commission free to vary the definition of express service and therefore the operating authority of the Railway Express Agency, in accordance with the issues in the administrative proceedings before it?

2. May the Railway Express Agency lawfully maintain a service so limited by tariff as to exclude articles which are expensive to transport, and, thereby, to publish in the same tariffs rates and charges for the aforesaid service which are the equivalent of freight rates rather than express rates?

3. So long as the Railway Express Agency maintains a transportation service which satisfies the criteria laid

down by the Commission as definitive of express service, is the Agency free to maintain a lower grade service at cheaper rates?

4. After having granted to Railway Express Agency virtually nation-wide motor carrier operating authority upon the premise that the limitation thereof to "express service" would prevent operation in freight service, is the Commission free to enlarge that operating scope so as to effectively remove the limitation without a showing of public convenience and necessity?

5. Is the Congressional policy against entry by the railroads into the motor-carrier field of transportation to be frustrated by permitting the Railway Express Agency, a railroad subsidiary holding virtually nation-wide motor carrier operating rights, to transmute its character from that of an exclusively express carrier to that of a general freight carrier?

## STATEMENT

By tariffs filed to become effective January 12, 1962, Railway Express Agency, Inc., published charges applicable to the transportation of up to 2,500 pounds of freight when loaded by the shipper into containers specifically designed for use in such an operation. By the provisions of those tariffs, however, certain commodities were not to be included in the container load, among them being articles requiring protection from heat or cold. The new container charges were and are either at or below the charges made by the motor carriers for transportation of the same commodities in ordinary freight service. The normal or traditional charges of Railway Express were and are much higher than the container charges and include protection against excessive heat or cold.

In a report served July 26, 1963, the Hearing Examiner found the container rates to be unlawful because they applied to transportation which Railway Express Agency, Inc., is not authorized to perform. (Appendix B, p. 16a) After oral argument, which was opened to interested persons whether or not previously parties to the proceeding, the Commission entered its report and order dated October 19, 1964. (Appendix B). In that decision, the Commission stated that the primary issue to be resolved is "whether an express company may transport at nonpremium rates traffic which is not shown to move more expeditiously than in ordinary less-than-truckload freight service or to require any special handling or protection." (Appendix B, p. 17a)

In reversing the Hearing Examiner's conclusion that the container charges are unlawful because they apply to a non-express service, the Commission promulgated a formulistic definition of express service which consists of five controlling criteria in substitution for the traditional concepts of expedited handling, care, and transportation of perishable, fragile, or valuable articles, to which it had previously consistently adhered. (Appendix B, pp. 21a, 25a).

In *American Trucking Associations, Inc.* v. *United States,* 364 U.S. 1 (1960) at page 6, this Court said:

> "Both the Commission and this Court have recognized that Congress has expressed a strong general policy against railroad invasion of the motor carrier field."

For many years past, motor carrier and freight forwarder interests have been aware of the possibility of the entry of the railroads into the motor carrier

field through the doorway of the Railway Express Agency. That railroad subsidiary has, through numerous applications to the Commission, been granted motor carrier operating rights of a size and scope which exceed those held by any motor carrier of freight. In general, these grants to the Railway Express Agency, however, have authorized operation only in express service as distinguished from the transportation of general freight. Such restriction was a deliberate policy of the Commission as evidenced by its report in *Railway Express Agency, Inc., Extension—Charlottesville,* 94 M.C.C. 62 (1963), in which at pages 76 and 77, the Commission said:

> "* * * [P]rotestants * * * have given expression * * * to considerable apprehension that the Commission in granting authority to REA is giving birth to a nationwide railroad-controlled motor carrier which would be fully competitive with general freight carriers, * * *.
>
> "* * * Protestants may rest assured, * * *, that we shall continue to scrutinize REA's operations with a view to forestalling any developments which threaten to change the character of the services provided by it to the serious detriment of other carriers. * * *"

In the case at bar, the Commission declined to apply the policy it had promised in the *Charlottesville* and similar cases and, even more important, it declined to apply in this rate case the standard for distinguishing between express and freight service which it had adopted and applied in the operating rights cases.

Because they viewed such inconsistent administration of the Interstate Commerce Act as a virtual invita-

tion to Railway Express to invade the field of motor carriage of general freight, these appellants, on April 26, 1965, and June 25, 1965, filed their complaint and intervening complaint in the United States District Court for the District of Massachusetts in Civil Action No. 65-307-C, seeking to have the Commission's report and order set aside and annulled. On May 31, 1966, the court entered its opinion and judgment (Appendix A) dismissing appellants' complaint.

The opinion of the court below rests upon three basic conclusions which these appellants believe to be without warrant in law. They are:

1. The Interstate Commerce Commission is not bound by the definition of express service it has heretofore used.

2. Nothing in the definition of express service prohibits the publication of rates applicable only to a limited category of shipments or service.

3. So long as Railway Express holds out a transportation service which satisfies the criteria laid down as definitive of express service, Railway Express is free to maintain cheaper rates applicable to a lower grade of service.

The foregoing conclusions of the court below are drawn in issue on this appeal by the first three questions submitted for resolution. The remaining two questions epitomize the importance of the case. They ask (1) whether the scope of the motor-carrier authority of Railway Express, once granted on a restricted basis, can thereafter be broadened and enlarged by interpretation without proof of a requirement therefor by

the public convenience and necessity, and (2) whether the long-standing Congressional policy against unlimited entry into the motor-carrier field by the railroads shall be eroded by relaxation of the criteria and standards under which the Interstate Commerce Act has heretofore been administered.

## THE QUESTIONS ARE SUBSTANTIAL

There can be no doubt that the Congressional policy against unlimited entry by the railroads into motor carrier operation, as recognized by the Court in the *American Trucking Associations* case, *supra,* still stands. No other view is consistent with the Congressional action which, by amendment to the Interstate Commerce Act,[1] has promoted and encouraged competition between and among the *separate* modes of transportation. This Court has had occasion to review the decisions of the Commission in which reliance had been placed upon such amendments, *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.,* 372 U.S. 744 (1963). Had it not been the intent of Congress that the integrity of the distinction between the separate modes of transport should be preserved, there would have been no occasion for amending the Interstate Commerce Act to permit a greater degree of inter-modal competition. The common interests stemming from participating in more than one mode would render such inter-modal competition meaningless.

There can also be no doubt that if Railway Express is free to enter the field of freight transportation by publishing freight rates in express tariffs, the rail-

[1] Section 15a(3), 49 USC 15a(3).

roads have, ready to their hand, the means of defeating in its entirety the Congressional policy against railroad invasion of the motor carrier field. This is so because Railway Express is today the nation's largest motor carrier from the standpoint of route miles. Heretofore, its operations over its vast network of routes has been in the performance of express service, but the Commission and the court below have held that so long as Railway Express maintains a true express service, for which it publishes express rates, it is free to offer also a lower grade service, less costly to perform, and to make applicable to that service rates which reflect the operational savings which stem from its lower grade character. Obviously, the net result of the holdings is to permit Railway Express to engage in the carriage of freight at freight rates.

Wholly apart from the fact that the practical effect of the holdings of the Commission and the court below would be to frustrate a Congressional policy of long standing, the comment of the court below that it sees no reason why the Commission should be bound by the traditional definition of express which the court itself had approved in *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (1963), aff'd *per curiam*, 376 U.S. 514 (1964), is a startling philosophy which is dangerous in the extreme. The traditional definition of express service had been relied upon by the Commission to distinguish from ordinary freight service the operations it had authorized Railway Express to institute pursuant to the finding of a requirement by the public convenience and necessity for *express service*. In *Railway Express Agency, Inc., Extension—Nashua, N. H.*, 91 M.C.C. 311 (1962), which was affirmed in *Auclair Transportation, supra*, and in many others, the

Commission had found that the existing motor carriers of freight were not providing express service over the routes sought by Railway Express. It thereupon issued a certificate to Railway Express authorizing it to operate as a motor carrier in the transportation of express. By the very dogma of each such case, Railway Express was thereby restricted to transporting express and prohibited from transporting freight. *There was a distinction made, and it was incorporated into the operating authority as a limiting restriction.* To permit that distinction to be rendered meaningless by an exercise in semantics is to abandon a basic principle of justice. A thing is not flesh one day and fowl the next because its environment has been changed. From the standpoint, then, of propriety of the actions of administrative agencies generally, the questions presented by this case are of prime importance.

The questions presented by this appeal are of extraordinary importance to the motor-carrier industry at large and to the freight forwarding industry. The motor carrier industry was brought under Federal regulation more than three decades ago. [49 U.S.C. 301 *et seq.*] Among the primary provisions of the regulatory legislation were those relating to the limited right of entry into the regulated service. While the right of then-existing carriers to continue their "grandfather" operations was zealously protected, *United States* v. *Carolina Freight Carriers, Inc.*, 315 U.S. 475 (1942), new operations could be commenced only upon proof of a requirement therefor by the public convenience and necessity. 49 U.S.C. §§ 303(c), 307; *Pan-American Bus Lines Operation,* 1 M.C.C. 190, 201 (1936). See also *Hudson Transit Lines* v. *United States,* 82 F. Supp. 153, 157 (1948), aff'd *per curiam,*

338 U.S. 802 (1949). Accordingly, each certificate issued by the Commission to authorize the operation of a motor-carrier service was carefully worded so as not only to authorize but also to limit the operations for which a legal basis had been laid. 49 U.S.C. §§ 307, 308. It was for the precise purpose of both authorizing and limiting the motor-carrier operations of Railway Express that the certificates granted to it described its operations as transportation of property *"in express service."*

There can be no doubt, whatever, that the meaning of the phrase "in express service" was intended by the Commission to proscribe operation by Railway Express in the transportation of general freight. Indeed the Commission went out of its way to assure the motor carriers generally that there would be no subsequent expansion of operating scope, saying that it had "consistently recognized certain fundamental differences between express service and ordinary freight service * * *." *Railway Express Agency, Inc., Extension—Durant-Kosciusko,* 34 M.C.C. 111, 114 (1942). In *Railway Express Agency, Inc., Extension —Madison, Wis.,* 94 M.C.C. 677, 681 (1964), the Commission stated that these differences have persuaded it to conclude "that a proposed line-haul motor movement of express by [Railway Express] will not present any substantial threat of undue competition with the operations of independent common carriers conducted generally at lower rates." See also *Railway Express Agency, Inc., Ext.—West Unity-Middletown,* 31 M.C.C. 363, 371 (1941); *Railway Express Agency, Inc., Extension—Charlottesville, supra; Railway Express Agency, Inc., Extension—Great Falls, S. C.,* 94 M.C.C. 102, 106 (1963).

Solemn though its assurances to the motor carriers had been, the Commission has done exactly what it said it would not do and has interpreted the phrase "in express service" as authorizing the transportation of general freight. Thereby the Commission has rendered nugatory, insofar as Railway Express is concerned, those provisions of the Interstate Commerce Act which require a showing of public convenience and necessity before a new motor-carrier service is authorized. That might not be so bad were it not for the fact that the motor-carrier certificates granted to Railway Express are numbered literally in the hundreds——And the effect of the Commission's change of definition is to authorize a new operation in the transportation of general freight over virtually the entire nation. The effect upon the motor-carrier industry as a whole cannot even be gauged. By the same token, a definition of express service permitting Railway Express to transport general freight will introduce substantial new competition for the existing freight forwarders as well.

## CONCLUSION

The questions presented by this appeal are of substantial public importance, and warrant plenary consideration by this Court upon briefs and oral argument. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be

reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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# APPENDIX

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## APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 65-30-C

NEW ENGLAND MOTOR RATE BUREAU, INC., *et al.*, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*.

### Opinion

May 31, 1966

Before ALDRICH, *Circuit Judge*, GIGNOUX and CAFFREY, *District Judges*.

ALDRICH, *Circuit Judge*. This is an action to set aside an order of the Interstate Commerce Commission approving a rate schedule filed by Railway Express Agency, REA, for container traffic, so-called, between thirty-five stated cities in the United States. The rate was approved by the full Commission. Freight, All Kinds, L.C.L. Container Charges,—U.S.A., 1964, 323 I.C.C. 468.[1] The plaintiffs, original and by way of intervention, are representatives of motor freight carriers and freight forwarders, and are proper parties to prosecute this proceeding. Their fundamental objection is that container service is not true express service, and therefore impermissible for REA as an express carrier.

Container service is elaborately described in the Commission's opinion, but, briefly, involves a special low rate for transporting a container of a fixed capacity (101 cubic feet) which the shipper may load with any number of

[1] One commissioner filed a separate concurring opinion, and two did not participate.

articles so long as the total weight does not exceed 3,000 pounds. The charge is on the basis of a 2,500 pound minimum, and does not depend on the nature of the lading. No special protection from heat or cold, or against theft, is provided, and a few enumerated types of articles, consequently, are not taken. REA furnishes the container, but makes a charge for excessive retention thereof. There is an additional charge, if the lading is to be distributed at destination for separate local delivery.

Although the container rate was found to be fully compensatory, the resulting economies enable REA to charge considerably less in some instances than motor freight carriers for essentially competing service. This is the rub.

We consider preliminarily the two points with which REA commences its brief. The President's Transportation Message to Congress of April 4, 1963, urging diminished regulation, experimentation, and "new kinds and combinations of service," cannot enlarge the statutory authority granted REA, or any other carrier. Nor can the meaning of that authority depend upon REA's financial circumstances. If REA is unable to survive on express business alone, this fact cannot create rights which it would not otherwise have. The Commission did speak of REA's financial need. We do not believe, however, that either of these factors was a basis for its decision that the container service was express service.

Plaintiffs argue that the Commission has rejected the "classic" definition of "express service"[2] and substituted

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[2] Plaintiffs give as one example of a definition "in classic terms" the one set out in *Transportation Activities of Arrowhead Freight Lines, Ltd.*, 1952, 61 M.C.C. 131, 140. "Essentially express service is a method of transportation by which shipments receive greater care, security, and faster transportation than are accorded ordinary freight either by the same carrier or by other like carriers generally. Express service also involves the idea of regularity as to route, or time, or both. *Retzer* v. *Wood*, 109 U.S. 185, 27 L. ed.

five criteria first set forth in the second *Arrowhead* decision, *Transportation Activities of Arrowhead Freight Lines, Ltd.*, 1955, 63 M.C.C. 573, 581-82.[3] These criteria appear to have been intended not as a change in the definition of express service, but as a refinement of the more general definition, making it clearer and more precise. With the difference that the five factors do not include premium charges, a matter to be discussed below, they depart from the former definition in no significant aspect. Plaintiffs seem to suggest that since we "approved" a particular version of the traditional definition in *Auclair Transportation, Inc.* v. *United States*, D. Mass., 1963, 221

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900. It is a premium service utilized mainly when conditions, generally at point of delivery, make its use by the shipper economically feasible despite relatively higher transportation costs. Because express service is marked by an undertaking to provide transportation services superior to that normally required and furnished for ordinary freight, it is both appropriate and proper that relative [*sic*] higher charges should be established for it."

[3] "Succinctly stated the rendition of a bona-fide express service by property carriers with authority to transport general commodities requires such carriers (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and, (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay."

F. Supp. 328, *aff'd per curiam,* 376 U.S. 514, the Commission was thereafter bound by it. In *Auclair* we were not asked to choose between one defintion and another. We quoted the definition set out by the Commission in the report under review, but the case did not involve any inquiry into its details. We see no reason why the Commission should be bound by the exact words it once used.

Plaintiffs contend that even under the five criteria, the container tariff is inconsistent with REA's authority as an express carrier. This calls for a brief analysis. Criteria (1) and (2), fn. 3, *supra,* are closely related. (1) is that an express agency must "transport any commodity which may be safely transported in ordinary van-type equipment." Although, as previously mentioned, REA excepts certain items from its container service tariff, it holds itself out to transport the excepted items under its other tariffs. (2) is that it must provide such care and security as the commodity may require. Contrary to plaintiff's intimations that commodities not demanding special treatment are within the exclusive domain of freight carriers, REA would certainly fail in its obligations if it refused to carry goods because they were not valuable or did not require special care.

Criterion (3) is that all shipments be handled with equal expedition from point of pickup to point of delivery. Plaintiffs do not contend that, once the container is in REA's hands, it is transported less expeditiously than other express shipments. Plaintiffs do argue, however, that REA fails to meet this criterion because the shipper has 48 hours free use of the container before and after shipment. We cannot agree. Obviously, it takes little time to load the container. The shipper's independent decision when to initiate the shipment cannot be imputed to the carrier if, as is the case, the carrier is willing and able to pick up, transport, and deliver the lading expeditiously on being called upon to do so. Any shipper of a single article, or of many articles in his own container, has an equal option.

As for criterion (4), plaintiffs do not contend that REA's transportation of the containers does not follow firmly fixed schedules, with fixed delivery times. And, although the meaning of criterion (5)'s "relatively simple billing [and] rate structures" is not entirely clear, there is no suggestion that REA's rate structure is not simple, even with this added tariff.

What plaintiffs' case really boils down to is that they would add a sixth factor. They point to the fact that the Commission and this court, *Auclair Transportation, Inc.* v. *United States, supra,* have stated that express service "usually" involves "premium rates." Rates, however, are only a result of the costs involved in transporting the commodities. If a premium charge is a frequent manifestation of express service, it is not an inevitable one. When shipments are given special care or security, the transportation costs to the carrier are greater, and, correspondingly, the rates charged to the shipper may be higher. So long as the rates are compensatory we could not give determinative weight to their relatively low amount. Nor, within the limits that the rate structure remains simple, can we find any inconsistency in an express carrier charging rates that to some degree correspond to the special handling, *vel non,* given the shipment. Nothing in the historical definition of an express carrier obliges it to charge a single rate.

REA's container service may not represent the highest calibre of express service. The question, however, is one of degree, and one as to which we give considerable weight to the expertise of the Commission. Concededly, a service might be so far diminished as to cease to be an express service entirely. The Commission gives, as an example, service that is delayed in delivery. We agree that this would be a fundamental departure. But we also accept the Commission's analysis and conclusion that REA's container traffic did not fall beyond the bounds.

It may well be, as plaintiffs suggest, that freight service has improved to such an extent that the distinction between express and freight carriers is considerably less marked than it once was. However, the distinction is not without meaning. We agree with the Commission that it is not for the freight carriers' progress to determine the permissible bounds of express service by some process of elimination, or by a charge that express carriers' rates in some instances are highly competitive.

Plaintiffs' other contentions have been considered, but do not require comment. The complaint will be dismissed.

---

**Judgment**

May 31, 1966

In conformity with opinion of the Court filed this date, it is

ORDERED that the complaint herein be dismissed, with costs taxed at $

By the Court,
HOPE K. CONNELL
*Deputy Clerk*

BAILEY ALDRICH
Bailey Aldrich
*Unites States Circuit Judge*

EDWARD T. GIGNOUX
Edward T. Gignoux
*United States District Judge*

ANDREW A. CAFFREY
Andrew A. Caffrey
*United States District Judge*

## APPENDIX B

**Freight, All Kinds, L. C. L., Container Charges—U.S.A.**

Decided October 19, 1964

**Report and Order of the Commission on Oral Argument**

WEBB, *Vice Chairman:*

Exceptions to the report and order recommended by the examiner were filed by respondent, by interveners in support of respondent, and by certain protestants. Replies to exceptions were filed by various parties. The parties were heard in oral argument, directed primarily to the scope of the respondent's operating authority under parts I and II of the Interstate Commerce Act. On the major point in issue, our conclusions differ from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective January 12, 1962, the respondent, REA Express, proposed to establish rates and charges, and rules, regulations, and practices affecting such rates and charges, applicable on freight, all kinds, less-than-carload, in containers, between 35 of the principal cities of United States, and from seven other origins to specified destinations.[1] Upon protest of individual motor carriers, motor carrier associations, freight forwarders, and certain railroads, the Commission, by order dated January 11, 1962, instituted an investigation into the lawfulness of the proposed schedules, but did not suspend them.

Evidence in support of the proposed rates was presented by respondent, and by numerous shippers and shipper or-

[1] Charges are also provided on glassware, in containers, from Corning, N.Y., to New York, N.Y. (Borough of Manhattan only), and on empty glassware containers in the reverse direction. The applicability of the proposed rates has since been expanded to some 250 cities in REA's Tariff 57A, ICC 8566.

ganizations. Opposing the rates were motor carriers, certain rail carriers, and freight forwarders. Respondent and protestants stipulated that data relating to the railroad line-haul costs developed in two pending proceedings[2] for the handling of respondent's less-than-carload express traffic might be considered.

No exceptions were taken to the examiner's statement of facts, which statement we find to be correct in all material respects. Our restatement of the facts will be limited to those deemed necessary for a clear understanding of the issues.

The container charges are applicable to the movement of all types of commodities, in straight or mixed shipments, with the following exceptions:

1. Articles requiring protection from heat or cold;
2. Live creatures;
3. Articles named in the money classification;
4. Articles the movement of which is prohibited in express service by governing tariffs; and
5. Human remains.

The containers used by REA have a maximum inside capacity of 101 cubic feet. Because of the capacity limit of the forklift equipment generally in use at respondent's terminals, the tariff imposes a maximum safe loading limit of 3,000 pounds. When the weight of the lading does not exceed 2,500 pounds, a flat charge is assessed for the transportation of the loader container. An additional charge is assessed for each 100 pounds or fraction thereof in excess of 2,500 pounds. If a consignor tenders a shipment of more than one container at the same time and place for

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[2] I. and S. Docket No. 7644, Men's & Boys' Outerwear—Bruceton, Tenn., to U.S.A., and Docket No. 33918, Phonograph Records or Jackets—REA—Richmond, Ind., to U.S.A.

delivery to one consignee at the same destination, the charge for the second and each subsequent container is, depending upon the length of the haul, about 95 to 97 percent of the charge for the first container. For example, the flat charges for a single or first container, on all-freight shipments up to and including 2,500 pounds, range from $20 from Rochester to Buffalo, N. Y., to $173 from Littleton, N.H., to Los Angeles, Calif. Charges for any additional containers are $19 and $168, respectively, or a discount of $1 and $5 per container. The charges for the excess over 2,500 and up to 3,000 pounds in a container range from $1 to $6 per 100 pounds or any fraction thereof, the level again depending upon the distance involved.

By consigning a container to respondent's agent, the proposed schedules permit split delivery service on prepaid shipments to no more than 10 consignees located within prescribed limits of a destinaiton city. The principal split delivery address is the one to which the greatest number of pieces in a container are destined. The container must be loaded so that these pieces can be removed last. While no extra charge is made for the latter service, there is a charge per piece for the others. This charge varies in accordance with the weight and number of pieces to be delivered at each address. For example: For the first and heaviest piece, $1, if 300 pounds or less, and $1.65, if over 300 pounds; for each additional piece delivered at the same address, 25 cents from 1 to 75 pounds, 50 cents from 76 to 150 pounds, 75 cents from 151 to 300 pounds, and $1.20 for over 300 pounds. Split delivery service and the charges therefor cover and apply only to the movement of shipments in single containers. The tariff expressly excludes from the previously described multiple-container discount provision shipments subject to split deliveries.

The indicated rates and charges apply to containers supplied by REA with a maximum of 48 hours free time to

allow loading by the shipper or unloading by the receiver. Beyond such free time, a detention charge of 75 cents per container for each 24 hours is assessed. Respondent's purpose is to have sufficient containers available to facilitate the handling of all traffic offered to it under the proposed schedules. To assure the shipping public the opportunity of using the rates during peak demands and to permit their utilization for specialized movements, the rates apply also to shipper-furnished containers.

The flat container charges, as noted by the examiner, are related to the less-than-truckload motor carrier class rates between the involved principal points. They generally reflect the approximate equivalent of motor charges for the transportation of a class 55 shipment weighing 2,300 pounds. The following table depicts the motor carrier class basis, used by REA to indicate the pattern of the container charges, and the related probable weight and density of the lading:

| *Class* (percentage of first class) | *Weight* (pounds) | *Density* (pounds per cubic foot) |
|---|---|---|
| 50 | 2,500 | 25 |
| 55 | 2,300 | 23 |
| 60 | 2,100 | 21 |
| 70 | 1,800 | 18 |
| 85 | 1,500 | 15 |
| 100 | 1,300 | 13 |
| 150 | 800 | 8 |
| 200 | 600 | 6 |

As noted above, additional charges are assessed on the excess over 2,500 pounds. The class 50 less-than-truckload charges thus serves, in effect, as a minimum charge, regardless of the density of the traffic. The respondent maintains that the density evaluations are conservative in view of the fact that part of the theoretical stowage space of the container might be lost due to the incompatibility of package sizes and shapes with the dimensions of the con-

tainer. A loadability factor of 80 percent of the cubic capacity is anticipated.

Among the advantages derived from containerization of freight are the following:

> The avoidance of multiple handling of individual pieces and expensive packaging;
>
> The elimination of detailed checking, record keeping, and billing;
>
> The reduction in claims involving loss, damage, and pilferage; and
>
> The simplification of tariff search and application, making rate ascertainment less costly and more convenient.

Although REA handles shipments of various sizes ranging from about 20 pounds up to carloads of certain perishable commodities, its principal traffic consists of small shipments averaging about 50 pounds. Approximately 93 percent of the total number of shipments, representing 64 percent of the total tonnage and 75 percent of REA's total revenue, consists of shipments weighing 100 pounds or less. Almost 50 percent of REA's traffic moves at its first and second class rates or multiples of first class which generally are higher than the comparable motor carrier class rates; about 35 percent moves on commodity rates, covering such articles as printed matter, wearing apparel, shoes, drugs, auto parts, freight moving on Government bills of lading, and cut flowers, all of which are rated at or above the motor carrier general average of class 70 for less-than-truckload traffic; and only about 9 percent consists of miscellaneous commodities, some of which are rated below the indicated general motor carrier average classification. REA estimates that on an overall basis its traffic would be rated above the motor carrier average rating of class 100. However, respondent has derived

revenues averaging $3.95 for shipments up to 50 pounds, $4.75 for shipments from 50 to 100 pounds, and $5.27 for all shipments. All of these amounts are less than the minimum charges which would be assessed per shipment if this traffic were to move by motor carriers. But it should be pointed out that while motor carriers assume full liability on all shipments they transport, unless otherwise indicated in their tariffs, REA does not. As in all REA tariffs, the applicable tariff in the subject proceeding directs the shipper to the Official Express Classification, 36 I.C.C. 8200. Rule 13 of that Classification states:

> Rates published in tariffs governed by the Classification, except as to ordinary live stock, are dependent upon and vary with the declared or released value of the property, * * * and are based upon property declared to be of, or released to, a value not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound actual or billing weight for any shipment in excess of 100 pounds. When the declared or released value exceeds that above stated, the charges are 18 cents[3] greater for each $100 or fraction thereof in excess of the value stated above.

In 1960, almost 60 million shipments were handled by REA, with an average weight of 46.5 pounds. This was a reduction from 87 million shipments in 1950 when the average weight was about 61.5 pounds. During the 20-year period, from 1938 to 1958, REA's traffic declined from 1,480 to 1,197 million ton-miles. The 1958 volume amounted to only 80.9 percent of that handled in 1939, although by 1958 motor common carriers had increased their traffic volume over 1939 by 367.6 percent and the railroads by

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[3] Supplement 35 to the above Classification increases the charges to 23 cents except in eastern territory where the charge will be 25 cents. The initial charge was authorized in Released Rates Order No. 848 of March 1, 1929.

65.4 percent. In relation to all intercity freight traffic, respondent's share declined from 0.27 percent of the total in 1934 to only 0.1 percent in 1958. By contrast, the share of motor common carriers increased from 9.79 percent of the total in 1939 to 20.57 percent in 1959.

As a result of the increased competition from motor carriers for short-haul traffic and from freight forwarders for long-haul traffic, and the comparatively higher rates of respondent for what has come to be generally equivalent service, REA lost substantial less-than-carload traffic, particularly in the 2,000- to 3,000-pound weight bracket. Its general financial condition steadily deteriorated. For example, its operating deficits increased from an estimated $16 million in 1955 to $37.8 million in 1958. However, in 1959, a new standard agreement was concluded with the railroads and new management assumed control of the company. New operating and pricing policies were inaugurated. Since that time REA's position has improved to the point where in July 1962, it expected to show a modest net profit for the previous 12-month period.[4]

To achieve this result REA revamped its express operations and, with respect to less-than-truckload and less-than-carload merchandise, became a vigorous competitor of motor carriers and freight forwarders. Increasingly, the choice of shippers among the three types of carriers has been governed by the level of their rates. REA continues to provide a so-called premium service at premium rates where the traffic involved requires special handling in the interest of expedition or special protection. As the examiner found, however, this so-called premium service is available primarily only in connection with shipments by air or with respect to perishables and valuables. REA views its contemporary transportation role, essentially, as the performance, under single-carrier responsibility, of

[4] REA's annual report for 1962 shows a net income of about $6.3 million.

nationwide service on virtually every kind of freight which, regardless of the size, shape, density, weight or value, is moved with approximately the same degree of expedition. In general, respondent's underlying line-haul is performed by the railroads, predominantly in passenger trains, with only about 5 percent of its total intercity service being provided over the highway. The record fails to disclose specifically to what extent REA utilizes rail transportation for the line-haul movement of the container traffic in question and to what extent a part of such traffic is transported by REA over the highways in its own line-haul vehicles. It is clear, however, that REA is authorized by the Commission to transport a part of the involved container traffic in all-motor service if the traffic moves in "express service" within the meaning of REA's certificates.

At the time of the hearings, REA had not handled more than 200 containers in any one week, the average being about 150 per week. The greatest portion of this traffic moved within and from official territory. Generally, the traffic moved in containers furnished by REA. Most of the transportation was interplant in nature. Early in 1962, REA made a survey to test the operational and economic practicability of its proposal. Details of that survey, protestant's criticism thereof, and shipper experience with containerization are outlined in appendix A.

**Disposition of Secondary Issues**

The examiner found the rates to be compensatory. Set forth in appendix B is the basis for this finding. At oral argument the freight forwarder protestants agreed with the examiner's conclusion. In reaching that conclusion, the examiner assumed the validity of most of the objections registered by the protestants to the respondent's cost study. Since the record clearly shows that the container rates would enhance REA's earnings, it would serve no useful purpose to discuss the matter further. We conclude that the rates in issue are compensatory.

The examiner also found that the proposal does not violate the just and reasonable classification requirement of section 1(6). We agree. *Container Service,* 173 I.C.C. 377, 434, 445, Cf. *General Increases—Eastern Central Territory,* 316 I.C.C. 467; *Motor Vehicles from Kansas City to Ark., La., and Tex.,* 318 I.C.C. 301.

Also, the examiner found that under section 15a(3) and the national transportation policy, the assailed rates do not constitute a destructive competitive practice. We agree. The proposed rates are not unlawful merely because they threaten to divert traffic. In *Meats, Fruits, Vegetables—TOFC—Transcontinental,* 316 I.C.C. 585, 592, the Commission, division 2, observed that:

> "To compete is to strive for something which another is actively seeking and wishes to gain." *United States* v. *Union Pacific R. Co.,* 226 U.S. 61, 87 (1912). Competition thus implies action and change. Disapproval of proposed reduced rates could be just as destructive of competition as approval. Obviously, a policy of ratemaking based primarily on maintenance of the status quo would be the antithesis of competition.

In *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.,* 372 U.S. 744, 759 (1963), the Supreme Court noted that:

> the setting of a rate at a particular level • • • [does not constitute] an unfair or destructive competitive practice simply because that rate would divert some or all of the traffic • • •.

The Supreme Court concluded that:

> If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from

> others, then the carrier is thwarted from asserting its own inherent advantages of cost * * *.

Here, the proposed rates would improve REA's revenue position. Protestants' costs are not shown. Such a showing is necessary to support protestants' claim that the involved rates constitute a destructive competitive practice. *Various Commodities from or to Arkansas and Texas,* 314 I.C.C. 215, cited with approval in *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co., supra,* at page 760.

**Discussion and Conclusions**

The principle argument of the protestants is that approval of REA's container rate concept would permit REA to expand its operations beyond the scope of its authority as an express company under part I of the act and beyond the authority conferred upon REA by certificates which limit its motor carrier service to general commodities moving "in express service."

The examiner condemned the proposed container rates solely on the ground that they applied to transportation which REA is not authorized to perform. In general, the examiner found that shipments weighing 500 pounds or less are prima facie express traffic but that, as to shipments weighing more than 500 pounds, REA failed to show that expedited service was required or that such shipments receive extra service or special handling because of their perishability, fragility, or value. Absent such a showing, the examiner concluded that the container rates applied to traffic which did not move in bona fide express service and that the involved rates therefore contemplated transportation beyond the scope of REA's authority as an express company.

While the examiner did not intend "to convey in any way the idea that containers, as such, cannot properly be

used," REA argues on exceptions that the effect of the examiner's findings is to make the use of containers impracticable; and that the 500-pound weight limitation would compel REA to curtail its operations. According to REA, the condemnation of its container rates by the Commission would demonstrate the inability of regulation to keep abreast of technological changes.

The motor carrier protestants recognize that technological advances have made it possible for them to provide transportation service which, in terms of expedition, would rival that of REA. They contend that, in legal contemplation, express companies exist merely to fill a transport void. Therefore, when improved motor carrier service narrows the difference, rate-wise and time-wise, between ordinary motor freight service and express service, REA, according to the protestants, must curtail its operations. At oral argument express service was described by counsel for certain motor carrier protestants as "a service that the motor carriers do not or are unwilling to or cannot feasibly render."

By using containers, which hold up to 3,000 pounds, REA could and would compete for some of the traffic presently transported by motor carriers and freight forwarders. The primary question to be resolved here is whether an express company may transport at nonpremium rates traffic which is not shown to move more expeditiously than in ordinary less-than-truckload freight service or to require any special handling or protection.

As previously mentioned, there is no specific evidence of record regarding the extent of intercity line-haul movements of loaded containers performed over the highway. However, it is clear that REA's motor carrier operating authority is sufficiently broad, territorially and commodity-wise, to be used for some of the movements in question, unless such movements are prohibited by the restriction in REA's certificates limiting the transportation of general

commodities to those moving "in express service." REA contends in this proceeding that it is authorized to perform the intercity transportation in question either by utilizing rail carriers or its own highway vehicles.

Authority granted to REA under part II of the act to transport "general commodities, moving in express service" may be regarded, at least for the purpose of this proceeding, as coextensive with its authority as an express company under section 1(3)(a) of the act. In the interest of brevity and clarity, the lawfulness of the assailed rates will be discussed primarily in light of the arguments that REA's highway certificates do or do not authorize the transportation in question. If such transportation is not "express service" within the meaning of REA's certificates, it would seem to follow, in the case of containers moved by rail, that a less-carload ordinary freight service is performed under part I without Commission approval of pooling arrangements between REA and the underlying rail carriers. The examiner so found.

More specifically, the basic issue in the proceeding is whether certificates limiting REA to the transportation of "general commodities, in express service" prohibit REA from carrying a particular type of *traffic* or whether they prohibit REA from performing a particular type of *service.* The examiner found that the rates apply to *traffic* which REA is not authorized to carry. We conclude that a highway express carrier of general commodities is not prohibited from handling any particular type of traffic nor required to publish any particular level of rates, but that an express carrier must move all the traffic it handles in express service, and may publish any level of rates for express service which is reasonably compensatory and otherwise lawful. This conclusion is supported by Commission precedent, by practical considerations of administration and enforcement of the act, and by the national transportation policy. A contrary conclusion, in our

opinion, would make it extremely difficult for REA to continue to provide a nationwide express service.

The Commission's leading case on the distinction between express service and general motor freight service is *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573 (1955). The *Arrowhead* case resulted from an investigation to determine whether certain operations of Arrowhead exceeded the scope of its authority to transport general commodities moving in express service. In the first report, the Commission, division 5, found that Arrowhead's unscheduled truckload and less-than-truckload operations constituted a general freight service rather than an express service. *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131 (1952). However, the Commission said at page 140:

> we cannot agree that the limitation of motor-carrier operations to express service prohibits per se the transportation of quantity shipments under any and all conditions.

On appeal, the Commission's cease and desist order was challenged as being unreasonably vague. The court agreed with Arrowhead that it was not possible to ascertain which of its unscheduled operations were interdicted and that the Commission's decision, at best, would support only an order dealing with Arrowhead's rates. *Arrowhead Freight Lines* v. *United States*, 114 F. Supp. 804 (S. D. Calif. 1953). In that connection, the court observed at page 813:

> the so-called "express carrier" finds it impossible to provide better equipment, and unlawful to provide faster service than motor carriers of "ordinary freight"; while motor carriers of "ordinary freight" are permitted to call themselves "express" carriers and to hold themselves out as providing "express service at freight rates."
>
> By a process of exclusion, then, we infer that the only criterion by which the Commission, or the car-

riers themselves, or any one else, can distinguish "ordinary freight" motor carriers from an "express" motor carrier is that the latter is expected to charge a higher rate for the same service.

If this deduction is sound, a motor carrier of "ordinary freight" is permitted to render an "express service at freight rates," but an "independent motor carrier of express" is only permitted to render like service at higher rates, i.e. "express service" at "express" rates.

On remand, the Commission was unable to accept the court's suggestion that it might be possible to dispose of the proceeding by entering a rate order. The Commission said, in effect, that the express rate level reflected the operating costs involved in providing express service, and that the generally higher level of express rates was not designed to protect general freight carriers from competition, but rather to compensate express carriers for providing additional or expedited service "under less favorable operating conditions than to carriers providing ordinary freight services." 63 M.C.C. at 582. Throughout its report, the Commission emphasized that the distinction it was drawing was between two types of transportation service. The five specific ultimate requirements for the rendition of a bona fide express service set forth in the second *Arrowhead* report and reproduced below do not support the proposition that express service can be differentiated from general freight service on the basis of particular traffic, a particular weight of shipment, or particular rates.

Such attributes of express service as the transportation of small shipments at premium rates are descriptive rather than limiting in nature. That is, if a true express service is held out to the public, most of the shipments attracted will weigh less than 500 pounds and the cost of moving

them expeditiousy will be greater than if they were held for aggregation into truckload lots. This means, of course, that the cost of providing express service for all traffic tendered necessarily must be recovered by a level of rates generally higher than that of carriers whose service is dictated or influenced by the economies to be derived from volume movements. In recognition of the considerations outlined above, the Commission laid down the followig five criteria in the *Arrowhead* case relative to the performance of highway express service:

> (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both;
>
> (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require;
>
> (3) to provide equally expeditious transportation and careful handling of all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery;
>
> (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public; and
>
> (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay. [63 M.C.C. at 581-582]

These are practical and concrete requirements intended for the guidance of carriers engaged in express service to assure that it remains bona fide. These succinctly articulated criteria, we hold, are controlling in defining express service.

It is clear that REA's operations satisfy the above criteria for express service. No party to this proceeding disputes that fact.[5] Furthermore, it is clear that the container traffic in question is moved by REA just as expeditiously as the traffic which the protestants describe as express traffic. The exclusion of certain specified articles from the application of the proposed rates is reasonable here since these commodities do not appear to lend themselves readily to movements by the described containers.

The *Arrowhead* case was recently reaffirmed by the Commission in *Railway Exp. Agency. Inc., Extension—Nashua, N. H.*, 91 M.C.C. 311, *aff'd Sub. nom., Auclair Transp. Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass. 1963), *aff'd per curiam*, 376 U.S. 514 (1964). Protestants in the *Nashua* case urged that a restriction be imposed in the certificate sought by REA which would limit it to the transportation of "comparatively small shipments for which, because of size, fragility, perishability, or value, the ordinary freight carriers are not providing the necessary speed, careful handling, and security." 91 M.C.C. at

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[5] W. T. Byrnes Motor Express, Inc., not previously a party of record, was permitted to appear and to present its views in oral argument. In oral argument, Byrnes alleged that at Watertown, N.Y., REA has spotted trailers at a shipper's platform for more than one day. These allegations are not supported by evidence of record and are apparently the subject of a pending complaint proceeding. We express no opinion regarding the merits of that proceeding. However, as made clear elsewhere in this report (see pages - , infra), REA is obliged, in accordance with the third test of the second report in the *Arrowhead* case, to provide equally expeditious transportation for all accepted shipments.

323, n. 19. The Commission refused to impose that restriction, stating at page 325 of its report:

> In the past, this Commission has avoided a restrictive commodity interpretation of express service even when such an interpretation has been requested by existing carriers of ordinary freight in order to allay their concern that REA's express service would overlap unduly their general freight operations. *West Unity—Middletown* case, *supra*. The *Arrowhead* and *Mistletoe* interpretations in no way conflict with this approach that recognizes the inherent error in interpreting "express" authority strictly from a commodity viewpoint.

At this point, we desire to make clear that our interpretation of "general commodities moving in express service" does not mean that all certificates hereafter issued to REA must confer authority to perform an unrestricted express type service. In considering applications by REA for extensions of authority, the Commission must tailor its grant to the need shown, even though the demonstrated need for service is less extensive than a complete "express service." Of course, the Commission is reluctant to impose upon REA or upon any other certificated carrier restrictions which are administratively undesirable or extremely difficult to enforce. See *New York Central R. Co.—Key Point Restrictions*, 79 M.C.C. 113, 120. However, we take this opportunity to reaffirm the following finding at page 325 of our report in the *Nashua* case:

> The *Arrowhead* and *Mistletoe* exclusions from "express" authority of liquid commodities, in tank vehicles, commodities requiring special equipment, and household goods are designed to be essentially a reflection of the true nonspecialized nature of express service, resulting in a limitation on the equipment which has been, and may properly today be used in

connection with operations conducted pursuant to authority to transport general commodities moving in express service.

We also wish to make clear that rejection, suspension, or condemnation of rates is appropriate where such rates apply to transportation beyond the publishing carrier's authority. In the case of REA, or any other express carrier, this means that the publication of rates applicable to delayed service which does not conform to the indicated criteria established in the second report in the *Arrowhead* case would not be lawful. The economies to be gained from providing such a delayed transportation service are available only to ordinary freight carriers.

The examiner's proposed definition of "express service" is not entirely clear. Apparently, the proposed definition would establish a conclusive presumption that shipments weighing 100, or possibly 300, pounds or less constitute express traffic; that shipments ranging in weight from 300, or possibly 100, pounds to 500 pounds are prima facie express traffic; and that all shipments, regardless of weight, may be considered to be express traffic if they are "shown to require expedited or special handling." Even if it seemed desirable to do so, there is no basis in this record for defining express service generally in terms of shipment size or weight. Historically, REA has handled shipments weighing in excess of 500 pounds, including carload shipments. See *Increased Express Rates and Charges, 1957*, 304 I.C.C. 699, 705, 725-727. In the recommended report in this proceeding, the examiner noted that "REA has lost substantial less-than-carload traffic, particularly in the medium range weight of about 2,000 to 3,000 pounds." Obviously, REA had no reason to believe that it was required to justify its container rates in terms of some arbitrary weight limit. To impose such an unexpected burden upon the respondent would be improper. Assuming, *arguendo*, that it would be desirable to define "express service"

in terms of a definite weight limit, the factual basis for such a limitation could be established only in a general investigation or ex parte proceeding.

A definition of express service in terms of perishability, fragility, or value, as recommended by the examiner, could not be articulated with the precision required for tariff publication. To define "express service" with reference to whether or not particular shipments require expedited handling is wholly impracticable. The definition could not be enforced. The traffic to which REA's containers rates apply is moved just as expeditiously as its other traffic, often in the same cars and trucks. No shipper would be likely to admit that the shipments he tenders to REA do not require expedited handling. If REA were obliged to determine whether each shipment tendered required expedited service, it would be required to substitute its judgment for that of its patrons. If REA were required to investigate every shipper's asserted need for expedited service, numerous shipments requiring expedition would be delayed. In apparent recognition of these practical difficulties, the Commission stated at page 340 of its report in the *Nashua* case:

> The choice is the shipper's; if he chooses to have his property move in an expedited fashion he is, in fact, using an express service. It is clearly in the public interest that, if at all possible, this choice not be precluded.

The position of the protesting motor carriers differs from that of the examiner to this extent. Acceptance of the argument of these protestants would not require the Commission to define "express service" in terms of an arbitrary weight limit, or with reference to the transportation characteristics of particular commodities or with reference to such shipments as require expedited handling. Essentially, the position of these protestants is that the term "express", as

used in REA's certificates, is intended to authorize only a service which is noncompetitive with the ordinary freight service provided by general commodity carriers,[6] but competitive with the express service the latter are also authorized to perform, though they seldom choose to do so as such. They further assert that if ordinary freight service improves to the point where it compares favorably with express service, competitive operations by REA would be unlawful. We are unable to reach these conclusions either as a matter of certificate interpretation or in compliance with our obligation to promote the objectives of the national transportation policy.

The intercity highway movements of REA and those of motor freight carriers are performed with the same general type of equipment. REA and its competitors are governed by the same speed limits. Since the latter are authorized and are physically able to perform a service no less expeditious than REA's, the consequence of accepting the protestants' arguments is clear. REA's operating rights would soon resemble an accordion, expanding when the service of its competitors deteriorated or when their rates were increased, and contracting when the service of its competitors improved or their rates were reduced. In other words, the motor carrier protestants contend that, as a matter of managerial discretion, they can determine the effective scope of REA's operating authority. If the Commission had ever intended REA's authority to be voidable at the option of its competitors, the fact would have been plainly stated in at least one of the reports on numerous REA application proceedings. The Commission never so intended.

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[6] There are a limited number of commodities such as articles of unusual value and explosives, which are moved in express service, but which are usually excepted from grants of authority to transport general commodities.

It is true that transportation conditions have changed over the years so as to permit ordinary freight carriers to improve their operations to the point where they are now in a position to provide service substantially equivalent to that of express. Thus the distinction between the two types of services has been blurred to some extent. See *Arrowhead Freight Lines* v. *United States, supra,* at 813. This evolution, however, does not and should not deprive REA of its preexisting rights to conduct express operations in a manner consistent with the enumerated requirements described in the second report in the *Arrowhead* case. Nor do or should these changed conditions prevent respondent from applying new and advanced techniques and methods of handling its traffic or of pricing its service, in order to achieve economies and efficiencies which may directly or indirectly inure to the benefit of the public.

Express service and ordinary freight service, of course, have never been wholly noncompetitive. With changed conditions and the advent of REA's new management in 1959, competition between the two services has been waged more vigorously and on a wider front. Nevertheless, that competition has been peripheral. In 1961, for example, motor freight carriers transported approximately 85 percent of the total less-than-carload and less-than-truckload tonnage moved in the United States. REA's share was only about 2 percent of the total. We are convinced that the division of traffic between express service, as long as its performance and the rates applicable thereto do not contravene any provisions of law, and ordinary freight service ought to be determined by shipper preference, rather than by administrative fiat.

We find that the tariff schedules under investigation are just and reasonable and otherwise lawful.

COMMISSIONER TUCKER, concurring:

While I am able to reach the ultimate conclusion that the proposed rates are just and reasonable and otherwise lawful, I am unable to subscribe to the Commission's rationale in support of this conclusion. And in this case it is the rationale, more than the conclusion, which is important.

As stated in the report, a primary question to be resolved here is "whether an express company may transport at nonpremium rates traffic which is not shown to move more expeditiously than in ordinary less-than-truckload freight service or to require any special handling or protection." To answer this question necessitates an evaluation of what an express company may do; or, in other words, a definition of express service. I think it unfortunate and improper that to approve the proposed rates, the Commission has seized upon a definition of express service which is neither an accurate reflection of Commission and court precedent, nor a prudent regulatory response to the overriding policy issues involved.

Less than 2 years ago, this Commission defended before the courts its decision in the *Nashua* case, *supra*, which was a major reappraisal of certain of the requirements affecting REA's operations by motor vehicle. Included therein were several pages of discussion (91 M.C.C. 322-327) devoted to the meaning of the term "general commodities moving in express service," a term which the Commission points out to be, in effect, synonomous with the lawful scope of express service conducted under part I of the act and, in particular, with the lawful scope of express service which should be controlling here. As I reread those several pages, indeed as I reread the entire *Nashua* case, I find no five criteria listed as "concrete requirements * * * controlling" in defining express service, nor do I find anything which, in its proper context, more than remotely

resembles the Commission's treatment here of the express service issue. What I do perceive in the *Nashua* case is a reliance on a flexible concept of express service which has been recognized by the Congress, this Commission, and the courts; a concept of express identifiable by certain service "attributes," or characteristics, stressing the transportation of small parcels as well as other characteristic undertakings. Thus did we quote in *Nashua:*

> We have consistently recognized certain fundamental differences between express service and ordinary freight service, both by rail and by motor vehicle. Express service contemplates the expedited handling and transportation of comparatively small individual shipments often of considerable value and generally at premium rates. The service may be said to be competitive with ordinary freight service to a very limited extent only, and the mere fact that it can and does survive in competition with general freight service conducted generally at lower rates is indicative of the inherent difference between the two services • • • speed in handling is one of the principal characteristics of express service • • •. [91 M.C.C. at 322]

And this was the type of express service which was recognized by this Commission as being a "relative concept" and one "not susceptible of precise definition." 91 M.C.C. at 324.

On such a basis did we persuade the District Court and the Supreme Court (*Auclair Transp., Inc.* v. *United States, supra*) that our evaluation of express service in terms of its attributes was lawful, for the District Court found that we recognized express service in the *Nashua* case to mean—

> generally the expedited handling of small parcel traffic which common carriers of ordinary freight do not desire usually or are not able to perform. It is a service superior to that rendered as a rule by common carriers

> of general freight, and thus requires the payment of premium charges * * *. From this view it follows that express service is not susceptible of precise definition because it is, by its very nature, a service whose attributes of expediency, premium rates and special handling of freight must be judged in comparison with the services and rates provided and assessed usually by common carriers of ordinary freight. [221 F. Supp. at 332]

The *Nashua* case did not represent this Commission's initial consideration of the express service issue. Like the instant decision, the *Nashua* case looked to the second *Arrowhead* report for guidance. However, to the exclusion of over 77 years of precedent, the instant decision arbitrarily selects and denotes as "controlling" but one paragraph from the *Arrowhead* case, which it then proceeds to use as the controlling basis for interpretations of first impression. The *Nashua* case, on the other hand, reflects not only the entire *Arrowhead* case, but the entire history of express service.

In *Express Cases,* 117 U.S. 1 (1885), the express business was described before the Supreme Court as follows:

> * * * receiving and forwarding upon railroads, steam vessels, and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employees, and at destination personally delivering packages of money or currency, gold and silver bullion, bonds, bank notes, deeds, and other valuable papers, jewels, silks, laces, and other articles of great value requiring for their security extraordinary care and precaution, and also parcels of goods, wares, and merchandise, requiring great dispatch or careful handling, and also fruit, vegetables, fresh meats, fish, oysters, fish spawn, and other articles liable to decay or other injury from delay; and also live

> animals requiring particular care and attention during transportation; * * * and in so doing to afford the public, under a single contract, and on assured responsibility, safe, reliable, and speedy transportation from and to all points accessible only over two or more railroads, and generally to perform for the public all offices that, by usage, are incident to the class of carriers now well known, recognized and designated by the public, as "express carriers." [117 U.S. at 2, 3]

In the same proceeding, Mr. Justice Miller stated as part of his dissenting opinion:

> 1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.
>
> That, while it is not possible to give a definition in terms which will embrace all classes of articles usually so carried, and to define it with a precision of words of exclusion, the general character of the business is sufficiently known and recognized to require the court to take notice of it as distinct from the transportation of the large mass of freight, usually carried on steamboats and railroads.
>
> That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce * * *. [117 U.S. at 30]

And in 1887, the Commission itself described the service performed by express companies as—

> * * * a very general method of transporting all property of special value or of a perishable nature, or

> when speed in transit is for any reason desired. * * * The charges collected for such transportation are relatively high, as compared with the ordinary freight business of railroad companies, but the service is rapid and accurate. The existence of express companies and the facilities which they furnish have developed to immense proportions a busines adapted to the requirements of such traffic. Railroad companies prefer that freight in small parcels and of the nature in other respects considered appropriate to the express business, especially when quick transit is essential, should be handled by those agencies. [*In Re The Express Companies,* 1 I.C.C. 349]

The attributes of speed, special handling, reliability, small parcel emphasis, and "premium" rates, along with the "single responsibility" aspect of express service which had previously been noted by the Supreme Court in *Express Cases, supra,* have marked the rendition of a bona fide express service since the inception of that form of transportation and certainly since the establishment of this Commission. [It was "express service" as thus described which the Commission concluded at 1 I.C.C. 349 was subject to the act when performed by railroads or their agents, and which it recommended in its first Annual Report to the Congress, 1 I.C.C. 254, 273, be specifically included in part I no matter by who performed. Thus in 1906 came the specific inclusion of express companies in the act.]

It is my opinion that we cannot ignore these characteristics, for if the concept of express service has any meaning whatsoever within the contemplation of the Interstate Commerce Act, it must be the meaning which the Congress had before it when it gave statutory recognition to express companies.

What was said in *In Re The Express Companies* by way of describing express service is basically what has been

said by the Commission since, up to and including the *Nashua* case, e.g., *In Re Express Rates, Practices, Accounts, And Revenues*, 24 I.C.C. 380, and 28 I.C.C. 131, in which the Commission concluded that express service should be represented by a simplified form of rate structure; *Railway Exp. Agency, Inc., Ext.—West Unity-Middletown*, 31 M.C.C. 363; *Railway Exp. Agency, Inc., Extension—Durant-Kosciusko*, 34 M.C.C. 111; *Mistletoe Exp. Service Extension—Texas*, 61 M.C.C. 737, and *Arrowhead, supra*. Nothing the Commission or the courts have said about express service before now has failed to recognize it as a service distinguished from ordinary freight service by the several attributes which permeate its history.

It is, indeed, not a simple task to administer without a rigid definition the provisions of the act with respect to a transportation service the lawfulness of and need for which has been accepted for generations. It is equally difficult to acknowledge that a transportation concept may exist which, to paraphrase Mr. Justice Miller, must be identified by its characteristics or objectives because no precision of words can adequately describe it otherwise. But that, as I see it, is the nature of express service, and as such it is our regulatory responsibility notwithstanding the difficulty of the task.

It is not my purpose to explore each and every facet of the Commission's decision with respect to which I think some question might be raised. Such problems aside, what we are left with is a definition and interpretation of express service which provides no distinctive, substantive transportation dimensions save the exclusions against liquid commodities in tank vehicles, commodities requiring special equipment, and household goods, and no meaningful transportation requirements save a highly questionable single level criterion. In the words of the Commission:

> • • • rejection, suspension or condemnation of rates is appropriate where such rates apply to transporta-

> tion beyond the publishing carrier's authority. In the case of * * * any * * * express carrier *this means* that the publication of rates applicable to delayed service * * * would not be lawful. [Emphasis supplied.]

I see in the Commission's decision no other reasons suggested for the condemnation of an express rate as a means of regulating the proper, reasonable, and legal scope of competitive express service. Moreover, I seriously question whether there is any historical express practice over which we retain effective regulatory control through the definition adopted herein. Whereas express service was conceived and developed largely to transport small-parcel traffic, I can see nothing in the report to indicate that REA's future obligations with respect thereto would be essentially different from those of ordinary common carriers by motor vehicle. Similar questions ought to be anticipated respecting other undertakings historically associated with express service.

I can find no valid justification in the Commission's report for its decision to abandon, for the mechanical recitation adopted, the precedential view of express service in terms of its attributes. The Commission states that "transportation conditions have changed over the years so as to permit ordinary freight carriers to improve their operations to the point where they are now in a position to provide service substantially equivalent to that of express. Thus the distinction between the two types of services has been blurred to some extent." If the "distinction" to which the Commission refers is a legal distinction, then I suggest that it has not "been blurred," but is being blurred by this decision. If the distinction is one of transportation capabilities, then I would point out that the "changed conditions" to which the majority refers existed at the time the *Nashua* case was decided and long before, and that the Commission saw no reason to depart from precedent then. The mere advent of improved highway facilities has not

served to bridge the gap between express and ordinary freight service, if for no reason other than that there are time savings inherent in the express company's single-responsibility service, as opposed to the delays often encountered in interline routings frequently necessary by rail and motor. And in any event, speed in transit has never been the sole criterion for the rendition of express service.

There is no statutory definition of express service or of an express company beyond its classification in part I as a common carrier. To my view, it defies reason to arbitrarily conclude that, for example, a single level of service is a controlling legal "express" criterion, although an express carrier's specialization in the provision of small-parcel transportaiton is not, when everything which has ever been said by this Commission about express service has stemmed from the same initial descriptions of such service as contained in *Express Cases* and *In Re The Express Companies, supra.* In my opinion, express service has been and should be recognized as a composite of all of its characteristics; expedited movement over and above that offered by common carriers generally, special handling, reliability, small parcel emphasis, single responsibility, relatively simple rate structures, and a level of rates higher than those assessed by common carriers generally. When we can view the express company as a whole and, on balance, see that the service being rendered no longer promises to reflect the primary function of the express company within the framework of these historical attributes, then approval of a proposal which threatens further departure by an express company from that function would be inappropriate.

The record in the instant proceeding in my opinion provides a basis upon which to conclude that REA's operations generally present a balanced picture of a bona fide express service. It is predominantly a small-parcel carrier. Its level of rates is generally higher than the level

maintained for ordinary freight service. The majority of its traffic moves in passenger trains, which are faster than ordinary freight service. It seeks to transport, and does transport, commodities such as cut flowers and drugs which receive special handling. That it acts as a single-responsibility carrier on a regularly scheduled basis is not disputed. Accordingly, I am satisfied that its operations overall reflect, through these attributes, the function of express service; and I thus conclude that the proposed rates are lawful in furtherance of the express business.

Although the task of weighing and balancing the attributes of express service can hardly be said to be administratively simple, I think it essential that we continue to exercise some measure of effective regulatory responsibility in this area, especially in the midst of one of the most dynamic eras which transportation has experienced. The concept of express service which the *Nashua* case exemplifies, and which I think is proper, implies a continuing regulatory obligation to evaluate not only express service itself, but the relation between express service and other forms of transportation. Such an evaluation results in nothing being taken from the express company. It requires only that the express company not unduly exceed its intended function. Compare *Umthun Trucking Co. Ext.—Phosphatic Feed Supplements*, 91 M.C.C. 691. Within such a concept, the express company is completely free to expand and utilize innovations and new techniques in transportation—indeed, is encouraged to do so—as long as, on balance, its essential "express" function prevails.

Under the too-mechanical definition of express service adopted by the Commission, the regulatory considerations which should obtain will be obscured.

For example, the Commission's definition may leave us little room to dispose of potential questions arising from the fact that the express company occupies the enviable position of being able to couple its newly defined status with

its established advantage of paying only out-of-pocket rail costs for the movement of the vast majority of its traffic. *Express Contract, 1959*, 308 I.C.C. 545.

If we put all the intervening technicalities aside and simply look at the Commission's first express case and its subsequent regulatory experience in this field, it is clear that express companies were not created under the act as competitors with the nation's ordinary freight transportation plant, but were developed to render service integral to that plant.

It is not possible to predict with accuracy the course which future events will take, and many effects of the Commission's views must remain to be seen. It is reasonable, however, to expect that further development of the express company's services and capabilities will accompany future changes in the economics and technology of transportation.

With this in mind, I am unable to follow the Commission's line of reasoning underlying its approval of the rates at issue. It is an approach which does service to neither the express company nor its competitors. As a guidepost for future competitive relationships, it is too rigid and inflexible to have much practical value in the vital controversies arising between REA and other carriers.

Frankly, I am concerned that the Commission's approach to the issues in this case represents an interruption, and possibly a backward step, in our efforts to develop a truly realistic and comprehensive policy governing the express company's relations with other carriers. The danger implicit in this oversimplified approach is that it may well invite an unrealistic reaction and the application of unwarranted limitations on REA's potential.

Neither the Commission's decision here, nor the reaction it may generate, contributes in any way to what should be our continuing efforts to frame guidelines within which both REA and its competitors may best serve the public

interest. I cannot agree that the Commission's simple solution to the problem is proper, necessary, or desirable as a means to preserve such service.

CHAIRMAN GOFF and COMMISSIONER WALRATH did not participate.

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*It is ordered,* That this proceeding be, and it is hereby, discontinued.

By the Commission.

HAROLD D. MCCOY,
*Secretary.*

(SEAL)

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## APPENDIX A

*Pertinent excerpts from the report and recommended order of Hearing Examiner Jair S. Kaplan*

Various analyses of the container charges, in relation to the rates of competing carriers, were introduced by the parties. For the movements which took place during the different study periods, REA's container rates were, on an overall basis, lower than the corresponding charges which would have been applicable by either motor carriers or freight forwarders for similar shipments. Based on information supplied by the shippers of the 91 sample containers, 82 would have moved by motor and 9 by freight forwarders had the proposed rates not been in effect. Excluding four containers as to which no specific competitive rate data was available, the total charges by the indicated two modes previously used by the shippers for transporting the traffic would have amounted to $7,116.07, as compared with the corresponding REA container charges of $5,657, resulting in a reduction of about 20 percent.[1] Omitting

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[1] In 11 of the 87 instances given, REA's charges were higher than those which would have been applicable by the prior modes.

from the 91 sample shipments 47 which protestant freight forwarders considered as not being of a nature reasonably expected to move in their service, principally because of the relative short hauls involved, the forwarder total charges on the remaining 44 shipments would have been approximately $4,958, as compared with $3,610 by REA, which is about 27 percent lower. With respect to 36 of the 47 omitted shipments,[2] REA shows that its container charges totaled $1,838, or about 25 and 37 percent, respectively, lower than the comparative charges of $2,463.81 for motor carrier and of $2,936.48 for forwarder service.[3] The percentage reductions on most of the shipments handled by REA during the 7-week period previously mentioned, ranged, according to protestant motor carriers, from approximately 7 to 43 percent, the greatest majority being 20 percent or more, under the truck rates. For example, on 31 container shipments, with an average weight of 2,494 pounds, moving within Middle Atlantic territory, respondent's charges were by about 24 percent lower than those of motor carriers.

Eleven typical container movements were depicted by a shipper of electric motors, rated class 70 and 77½ for truck transportation. They took place during the first 5 months of 1962, from Buffalo to Detroit, Mich., Atlanta, Ga., Boston, Mass., and Dallas, Tex., and aggregated 29,227 pounds, or an average of 2,657 pounds per container. The total REA charges were $635, as compared with $922.45, had the shipments moved by motor, involving a reduction of 31.2 percent. The differences ranged from $14.90, for a container of 11 pieces, weighing 1,948 pounds, to Atlanta, where the Respondent's charge was $63, as against $74.90 by motor, to $48.65, for a container of 26

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[2] Assuming that forwarder service was not available as to only 11 of the 47 omitted shipments.

[3] The motor carrier rates appear to be at an average level of 83.8 percent of the freight forwarder rates.

pieces, weighing 2,982 pounds, to Dallas, where REA's charge was $93, as against $141.65 by motor. Another shipper has used the container service for the transportation of drugs and medicines from its manufacturing plant also at Detroit. The traffic has a motor carrier classification of column 70, when released to a value not exceeding 50 cents per pound, and a density range of from 20 to 40 pounds per cubic foot. The company has shipped containers only to its own branches in 13 cities. During a 5-month period, from February 16 to July 15, 1962, it shipped traffic amounting to 139,732 pounds in 70 containers, averaging 2,329 pounds per container. It paid to REA $3,280 for this service and, had it shipped by truck, the charges would have been $4,009.58. The container charges were 18.2 percent below the motor charges. Somewhat similar examples were given by other shippers.

All of the shippers generally agree with respondent that the quality of REA's service, especially insofar as it relates to pickup and delivery and time in transit, is not substantially different from that of motor carriers. Admittedly, despite certain advantages inherent in container service, the principal incentive for the use of respondent is its lower charges as compared with competing modes, particularly truck transportation. The differences in total charges depend to a large extent on the actual weight loaded in a container. There is a weight break, indicated by certain shippers to be about 1,700 or 1,800 pounds, below which point it is cheaper to ship by motor and above which it would be cheaper to ship in REA's container service. In most instances the traffic they have offered to respondent has been of the so-called captive variety. Further shipper evidence concerning the tonnage actually or potentially subject to diversion is hereinafter described.

A steel casting company ships from Portland, Oreg., certain parts of rock crushing machiner, power shovels, and similar equipment, with an average uniform classifica-

tion rating of class 60. While its transcontinental traffic generally moves in carloads and in piggyback service, about 50 percent of its movements within 11 Western States, amounting to about one million pounds per month, is suitable for respondent's container operations. The limited use of the latter service thus far has been due to the uncertainty of the outcome of the instant proceedings. The previously mentioned shipper of drugs and medicines from Detroit, based upon its actual experience with REA's service during 5 months in the first half of 1962, estimated that its annual container shipments would amount to somewhat over 335,000 pounds, involving a loss of $9,623 in revenue to competing modes. The container traffic formerly moved about 90 percent by motor carriers, 5 percent by freight forwarders, and only 5 percent by REA. Another manufacturer and distributor of drugs and medicines has used the container service from Brooklyn, N. Y., to Denver, Colo., Minneapolis, Minn., Los Angeles and San Francisco, Calif., Cincinnati, Ohio, Houston, Tex., and Boston or Cambridge, Mass. Based upon its past experience, it estimated that its annual potential container volume would be about 1,000,000 pounds to Denver, 380,000 to 400,000 pounds to Minneapolis, 415,000 pounds to Chicago, and 200,000 pounds to Cambridge. The traffic now moving by container has been diverted from motor carriers and freight forwarders. A third shipper of drugs and medicines expects to offer REA two or three containers a week, with ladings averaging 2,130 pounds, from Hammonton, N. J., to Pittsburgh, Pa. About 50 percent of the traffic which formerly moved by motor carriage is now being transported by REA. The previously mentioned manufacturer of electric motors at Buffalo has so far actually shipped container traffic to only a limited number of destination points, at a rate of about two or three containers a week. While it estimates its annual container traffic to be about 600,000 pounds to 10 principal points, it has a potential use to all of the 35 cities named in the tariff. The traffic moving

in container service has been diverted mainly from motor carriers and freight forwarders. A manufacturer of sharpening stones at Littleton, N. H., has utilized REA's container service to eight principal points. This traffic thus far has amounted to approximately 40,000 pounds per month and has been diverted primarily from motor carriers. The freight has an average density of 37.2 pounds per cubic foot and is rated class 55 for motor transportation. A check of container traffic by the transportation manager of the Chamber of Commerce of Louisville, Ky., revealed 22 inbound and 21 outbound shipments from and to about 10 principal named points. Although the traffic was rated from first to third class, REA's container charge represented the equivalent of 50 percent of first class. Some of this Louisville freight was diverted not only from motor carriers and freight forwarders, but also from rail less-than-carload service and private carriage.

Freight forwarder operations performed in the movement of less-than-carload shipments are substantially similar to those of REA, not only with respect to pickup and delivery, but also insofar as the use of underlying railroads is concerned. However, the traffic of the former moves on freight rather than passenger trains and the charges to the forwarders for the rail line-haul transportation are ordinarily based on the published carload rates, rather than on any special arrangement on an out-of-pocket cost basis such as the one obtaining between REA and its railroad owners. Freight forwarders compete with each other and with motor carriers particularly for the transportation of less-than-carload or less-than-truckload ordinary freight, as contrasted with the relatively smaller express shipments. One of the three forwarder protestants which submitted evidence showed that the average weight of its shipments was 415 pounds in 1960 and 430 pounds in 1961. Another of these three freight forwarders handled in 1961 nationwide 3,039,636 shipments weighing 599,640 tons, or an average of about 400 pounds per shipment. The latter paid

$51,727,889 for purchased transportation and incurred other operating expenses amounting to $21,013,052, as compared with transportation revenues of $72,622,196, resulting in a deficit in net income of about $98,864. The three freight forwarders generally indicate that due to the establishment of the relatively low container rates they have lost traffic. Concededly, some of this loss has been limited or its volume is not subject to precise determination. Nevertheless, they were able to give certain specific examples. For instance, two of the forwarders handled drugs and medicines for the Brooklyn shipper. The traffic of one of the forwarders amounted to 416,859 pounds in 1961, as compared with 135,600 pounds during the first half of 1962, to seven of the destination cities. The second forwarder handled an average of 30,000 to 40,000 pounds monthly from that shipper prior to the establishment of the container rates, but only 8,000 pounds per month thereafter. The third forwarder had lost in the first 7 months of 1962 about 75,000 pounds of freight moving from a point in New York, because REA's rates were 15 to 17 percent lower than its own corresponding competitive rates. No specific traffic data has been presented by any protestant motor carrier.

The four rail protestants, Southern Pacific Company, Missouri Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, and Union Pacific Railroad Company, compare REA's container charges with representative rail carload and less-than-carload rates, as well as freight forwarder less-than-carload rates from New York City, Chicago, Ill., and St. Louis, Mo., to either Los Angeles, Calif., or Houston, Tex., on numerous commodities. REA's charges were converted for this purpose to rates per 100 pounds, based on a container lading of 2,500 pounds. In practically all instances, the REA's rates are lower than the rail less-than-carload rates and the corresponding freight forwarder rates, the latter generally being on a slightly lower level than the rail less-than-car-

load rates. There are a substantial number of carload rates which are higher than the converted REA rates. For example, of the rates on 129 articles listed by the Santa Fe from Chicago to Houston the rail carload rates produce the lowest rates in 89 instances, while REA charges are the lowest in the remaining 40 instances. A specific example is the REA's converted rate of $2.56, as compared with the rail carload rate of $2.73, minimum 24,000 pounds,[4] and the rail and freight forwarder less-than-carload rates of $3.84 and $3.82, respectively, on advertising matter and on printed matter, paper or paper board, n.o.i.b.n. Included in the 7-week survey, there have actually been container shipments to points in western territory of such commodities as advertising and printed matter, automobile parts, bearings, drugs, electrical appliances, flavoring compounds, and photographic materials. However, none of REA's container movements from one consignor to one consignee involved total quantities approaching a carload. Moreover, insofar as the 1,019 carload rates listed by rail protestants are concerned respondent shows that only 78, or about 8 percent, of these rates are based on exception ratings or commodity rates equivalent to class 35 or higher. Generally, an insignificant amount of carload traffic moves on class rates, producing only 3 or 4 percent of rail revenue. Respondent asserts that since no data has been submitted as to any actual transportation under the rail carload rates —or, for that matter, also under rail less-than-carload rates—such "paper" comparisons should not be given any weight.

In 1961, the Southern Pacific and the Santa Fe System, respectively, derived revenues of about $5.9 and $7.8 million, for the transportation of 165,894 and 194,956 tons of less-than-carload traffic; $11.9 and $35.3 million for 45,894 and 100,511 cars, or 584,128 and 973,287 tons of freight forwarder traffic; and $4.6 and $6.7 million for handling REA's less-than-carload express traffic. The corresponding rev-

[4] Subject to Rule 34 of the uniform freight classification.

enue figures for the Union Pacific, and the Missouri Pacific, respectively, are $6.8 and $2.8 million, for less-than-carload traffic; $17.3 and $4.4 million, for freight forwarder traffic; and $4.6 and $3.3 million for express traffic. The latter railroad handled during that year 209,207 tons of less-than-carload traffic, with an average revenue of $13.45 per ton; 260,820 tons of freight forwarder traffic, with an average revenue of $178.11 per car and $16.94 per ton. The average revenue of the Missouri Pacific on all carload traffic, but excluding that of forwarders, was $159.13 per car and $3.89 per ton. The protesting railroads also show representative schedules and elapsed time for trains transporting express traffic, as compared with freight trains handling less-than-carload merchandise and freight forwarder carload traffic. The former, being passenger trains operating at speeds somewhat greater than ordinary freight trains (including time spent in terminals), would provide in most instances from 1 to 2 days faster service from New York, Chicago, or St. Louis, for example, to certain points in Missouri, Texas, and California. The difference in time is particularly pronounced in connection with the long-haul transcontinental service.

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## APPENDIX B

*Pertinent excerpts on costs from the recommended report and order of Hearing Examiner Jair S. Kaplan*

The out-of-pocket costs, per car-foot mile, for rail line-haul movement of REA's less-than-carload traffic are shown to be 7.222 mills, as computed by respondent, and 9.345 mills, as computed by the protestants. As previously indicated, and without judging the propriety of either figure, but merely to be on the conservative side, the protestants' higher cost will be accepted for use here. Based upon the area of 21.39 square feet occupied by a container and 8 square feet per one car foot, a container foot would be equivalent to 2.674 car feet. Multiplying the latter figure

by the protestants' cost per car-foot results in 2.5 cents. The ratio of 16.7 percent for empty container miles increases the line-haul cost to 2.9 cents per container mile.

The protestants object to the fact that in computing the line-haul cost REA failed to make an allowance for the operation of more assigned car-foot mileage than was actually utilized. The protestants computed container-mile cost on the basis of 19 percent utilization of space. While in 1960 there might have been 12.2 cubic feet of less-than-carload lading for each assigned car foot, REA's revised study for the fiscal year ending June 30, 1962, showed 23.1 cubic feet for each assigned car foot. REA maintains that the average load factor for all traffic is not applicable to the containers because the latter has exceptionally good loading characteristics, as compared with many articles, generally transported by it. Respondent handles in large quantities or frequently such commodities as fish, flowers, live animals, milk and cream, and explosives which have relatively low space utilization. These commodities require sufficient room to assure good ventilation or segregation from other freight to avoid damage or contamination. Among other items which depress the average load factor are gift fruit and tomato plants, which move seasonally and with a tendency toward a one-direction haul, as well as securities, currency, art works, and other valuables, which are accompanied by a messenger. Taking into consideration all of these circumstances, in addition to the fact that the containers are also top loaded, it is reasonable to conclude that the load factor and space utilization of the containers are more favorable than for the average traffic handled by respondent.

Terminal costs consist of sorting, platform handling, pick-up and delivery, and transfer functions within terminal areas, plus the overhead cost related thereto. REA's physical plant and its methods of operations have been developed to handle a large volume of relatively small packages. The movement of the containers will, admittedly,

entail some changes in the facilities and procedures of respondent. Because of its newness and experimental character, REA was convinced that it would be impracticable to attempt to ascertain the exact terminal costs for handling container traffic, until a sufficient volume thereof is secured and its facilities and operating practices are modified to handle the containers efficiently. As the best estimate of terminal costs, an illustrative container movement from Detroit to New Orleans, La., was chosen and a comparison was made between the known costs of handling separate packages and the cost of handling a similar shipment in a container. The comparison was based on a detailed count of the man-minutes and vehicle-minutes at each step or stage of the shipment handling. The technique of methods-time-measurement was used to determine the man-minutes consumed in loading or unloading a vehicle. Other items, such as vehicle travel time, waybill preparation, and platform transportation time were based on the system time values derived from studies made at 39 cities.

The protestants criticize the use of these system time values which are termed performance standards. The word "standard" is perhaps misleading here because it is widely used in management control of costs and in industrial cost accounting to mean an optimum degree of efficiency attainable only under ideal conditions, and against which actual performance is measured. Apparently, that is not the meaning intended here. The performance standards presented by REA are actual work measurements at 39 cities. The studies were extensive and included the detailed examination of more than 442 vehicle routes, 9,086 vehicle stops, and the handling of 20,259 pieces; all of which involved more than 7,832 observer man-hours and more than 32,987 individual stopwatch readings. Being actual work measurements, and not ideals or optimums, they are suitable for use in estimating the cost of the functions studied.

The protestants took exception also to the manner the vehicle travel time was allocated, which varied from the method usually employed by the Commission's cost finding section. However, the record does not contain the data required for the application of the latter method. Considering the fact that the minutes per shipment figure is very low and that it represents the allocation of all vehicle running time, it is doubtful that the method contended for would produce a greatly different result. Respondent's method is acceptable for the purposes of this proceeding.

Based on a study of system data for the period from February 1959 to August 1962, REA determined that the variability of man-hours with shipments was 75 percent. It asserts that since its direct cost comprises 75 percent of its total cost, this percentage figure represents a good approximation of its out-of-pocket costs. In support of this relatively low variability, respondent points out that fixed man-hours are caused by salary and small terminal offices, definite and inflexible vehicle assignments, large clerical staffs, and by the special services required in providing express service. The protestants, on the other hand, use a variability percentage of either 90, based on studies of motor carriers, or of approximately 100, based on a study relating man-hours to shipment handlings for the four REA regional groups for the months of July and December.

REA draws attention to the fact that its operations are not comparable with those of motor carriers, the latter performing line-haul as well as terminal operations, whereas those of respondent are mostly terminal in character. REA criticizes the July and December study on the grounds that it selected and used only a part of the data available; it treated the four REA regional groups as different but homogeneous units, without considering the revelant facts peculiar to each; and it left unexplained that portion of the regression line purporting to show that if REA's volume decreased to a minimum level, respondent would incur no costs whatsoever, despite the fact that it would

continue to exist and operate. Without resolving the question of the relationship of REA's direct costs to out-of-pocket costs, and again in order to be most conservative, the usual 90 percent variable for motor carriers advocated by protestants will be used to test the compensativeness of the rates. According, the $9.08 per container shipment for all direct costs, other than line-haul, presented by REA and referred to as terminal costs, should be raised to $10.90.

Computing the out-of-pocket costs on the basis of the indicated line-haul expenses per car-foot mile and REA's terminal expenses raised to the 90 percent variable level, for (a) the average shipment drawn from the study of the 740 container movements previously described, for an average haul of 1,071 miles, and (b) the illustrative shipment from Detroit to New Orleans, La., involving a distance of 1,204 miles, shows the following results:

| | Average shipment | | | Illustrative shipment | | |
|---|---|---|---|---|---|---|
| Revenues | | $70.86 | | | $68.00 | |
| Out-of-pocket costs: | | | | | | |
| Line-haul | $31.06 | | | $34.92 | | |
| Terminal | 10.90 | | *Percent* | 10.90 | | *Percent* |
| Total | | 41.96 | 100 | | 45.82 | 100 |
| Excess | | 28.90 | 68 | | 22.18 | 48.4 |

These costs are necessarily based on certain assumptions as to operating conditions and practices, such as loading characteristics of the rail cars used and the delivery of an empty container on the same trip when the loaded container is picked up. However, the margin of revenue over cost appears substantial enough to cover any difference between the conditions anticipated by the costs and those which actually exist or which may develop when the traffic is moving regularly and in volume. If anything, it is reasonable to expect that under the latter circumstances, the unit costs of REA would improve. The examiner concludes that the proposed rates have been shown to be compensatory.

## APPENDIX C

### Statutes Involved

### National Transportation Policy

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

### Combinations and Consolidations of Carriers

Sec. 5 [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, and August 2, 1949.*] [*49 U.S.C. § 5.*]

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any

contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

* * * *

(2)(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission

shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

**Application for Certificate of Public Convenience and Necessity**

Sec. 206 [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950, July 12, 1960, October 15, 1962.*] [*49 U.S.C. § 306.*]

(a)(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by

motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instances as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operations to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

(2) Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued under this chapter, or hereafter issued under this chapter pursuant to an application filed on or before September 1,

1950, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

* * * *

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of subsection (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle on October 1, 1935 may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

**Issuance of Certificate**

Sec. 207 [*August 9, 1935,*] [*49 U.S.C. § 307.*]

(a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission there-

under, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways.

**Terms and Conditions of Certificate**

Sec. 208 [*August 9, 1935.*] [*49 U.S.C. § 308.*]

(a) Any certificate issued under section 306 or 307 of this title shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 304(a)(1) and (6) of this title: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.